SUPREME COURT, U. S.

FILED

SEP 3 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-224

THE VILLAGE VOICE, INC. and
SCALI, McCABE, SLOVES, INC.,

Petitioners,

v.

DOMINIC S. RINALDI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

IRWIN N. WILPON
Counsel for Respondent
50 Court Street
Brooklyn, New York 11201
(212) 875-7480

September 1975.

INDEX

PAGE

Statement 1

Summary of Argument 3

ARGUMENT:

I. The judgment below is not final 6

II. There is no constitutional protection for false advertisements 7

III. There is ample proof of malice in this case .. 12

CONCLUSION 20

Appendices

Appendix A—Letter of Joseph Vincent Morello 1a

Appendix B—Report of Association of the Bar 2a

Citations

CASES:

Abell v. Cornwall Industrial Corp., 241 N.Y. 327 .. 9

Afro-American Publishing Co. v. Jaffe, (D.C. Cir) 366 F. 2d 649 9

Associated Press v. Labor Board, 301 U.S. 103 11

Bigelow v. Virginia, 44 L. ed 2d 600 .....3, 4, 10

Booth v. Curtis Publishing Co., 15 A.D. 2d 343 affd. 11 N.Y. 2d 907 11

Branzburg v. Hayes 408 U.S. 665 11

Broard v. Alexandria, 341 U.S. 622 11

PAGE

Church of Scientology of Cal. v. Dell Publishing Co., (D.C. Cal.) 362 F. Supp. 767 14

Cox Broadcasting Co. v. Cohn, 420 U.S. 469 .... 6, 13

Curtis Publishing Co. v. Butts, 388 U.S. 130 ..... 10, 14

Davis v. Schuchat, (D.C. Cir) 510 F. 2d 731 14

Donaldson v. Read Magazine, 333 U.S. 178 ..... 4, 10

E. F. Drew & Co. v. F. T. C., (2 Cir) 235 F. 2d 735 cert. den. 352 U.S. 969 10

F. T. C. v. Sterling Drug Co., (D.C.N.Y.) 215 F. Supp. 327 affd. 317 F. 2d 669 10

Ginzburg v. United States, 383 U.S. 463 11

Goldwater v. Ginzburg, (2 Cir) 414 F. 2d 324 cert. den. 396 U.S. 1049 15

Guam Federation of Teachers v. Israel, (9 Cir) 492 F. 2d 438 15

Halter v. Nebraska, 205 U.S. 34 11

Kaplan v. California, 413 U.S. 115 11

Miller v. California, 413 U.S. 15 11

Murray Space Shoe Corp. v. F.T.C., (2 Cir) 304 F. 2d 270 10

New York Times v. Sullivan, 376 U.S. 254 ..... 3, 10

Paris Adult Theatre I v. Slaton, 413 U.S. 49 11

St. Amant v. Thompson, 390 U.S. 727 14

PAGE

Santobello v. New York, 404 U.S. 257 9

Smith v. Goguen, 415 U.S. 506 11

Spence v. Washington, 418 U.S. 405 11

United States v. Hunter, (4 Cir) 459 F. 2d 205 cert. den. 409 U.S. 934 .....4, 10, 11

Varnish v. Best Medium Pub. Co., (2 Cir) 405 F. 2d 608 cert. den. 394 U.S. 987 14

CONSTITUTIONAL PROVISIONS:

United States Constitution, First Amendment ...*Passim*

STATUTES:

New York Civil Rights Law, Sections 50, 51 2

MISCELLANEOUS:

78 Harvard L. Rev. 1197-1198 4

80 Harvard L. Rev. 1010, 1031 ..... 4, 10

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-224

THE VILLAGE VOICE, INC. and SCALI, MCCABE, SLOVES, INC.,

Petitioners,

v.

DOMINIC S. RINALDI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The petitioner, The Village Voice, Inc. (hereinafter called Voice), a weekly newspaper, published articles about the respondent, a Justice of the New York Supreme Court, authored by Jack Newfield, one of its editors, dated August 31, 1972 (R29)*, October 12, 1972 (R32), November 9, 1972 (R37), and November 30, 1972 (R40). Jack Newfield also wrote an article in New York Magazine dated October 16, 1972 (R45) in which he repeated what he had said about respondent in the Voice.

* Numbers in parenthesis refer to page numbers of Record in Appellate Division.

The petitioner, Scali, McCabe, Sloves, Inc. (hereinafter calle Scali), is an advertising agency hired by Voice by a written contract (R69-81) under which, for a minimum compensation of $1000 a month, Scali agreed "to use its best efforts to develop successful advertising for Voice's product." Scali "reserves the right to refuse to prepare any material or cause publication of any material which in its sole judgment would be misleading, indecent, defamatory or unlawful." Voice agreed to indemnify Scali against any loss, including the cost of defending, in any suit or claim arising out of any advertisement prepared for and approved by Voice before publication.

The respondent's amended complaint against the petitioners (R20) contains two causes of action (1) for libel and (2) a statutory action under Sections 50 and 51 of the Civil Rights Law of New York. The action is based on the commercial advertisement, prepared by Scali and approved by Voice, published in the New York Times on February 25, 1973 (R27, Appendix to petition p. 14a). The advertisement refers to the prior articles written by Jack Newfield and repeats statements from them. These articles are attached to and made a part of the amended complaint (R28-48), which alleges these articles to have been false and maliciously published and that the false and malicious advertisement was published by the petitioners to gain commercial and financial advantage and to sell and obtain paid subscriptions for Voice by capitalizing on and exploiting the false articles concerning the respondent (R22).

The answers of the petitioners pleaded as a defense that the advertisement was privileged under the First Amendment (R52). The respondent moved to dismiss this defense. The petitioners moved for summary judgment. The New York Supreme Court at Special Term dismissed

the defense and denied the motion for summary judgment. The Appellate Division modified the order of the lower court to the extent of reinstating the defense. While stating that the advertisement was a commercial advertisement unprotected by the First Amendment, the Appellate Division stated that "at the very least the record presents an issue as to the character of the publication." The Appellate Division affirmed the denial of summary judgment to the petitioners, holding that even assuming that the advertisement was privileged, it would not survive a malicious publication and that the respondent had shown proof of malice which precluded summary judgment (Appendix to petition p. 3a).

Summary of Argument

1. The judgment below is not final because even if the commercial advertisement in this case was held to be entitled to the same First Amendment protection as a news article, there is evidence of malice which meets the standard set down by this Court in *New York Times* v. *Sullivan* (376 U.S. 254) and later cases and would thus deny First Amendment protection to the petitioners. The determination of the question of whether the commercial advertisement, absent a showing of malice, is entitled to First Amendment protection, would thus still leave this case without final determination which can only be had after a trial in the State Court on the issue of malice.

2. The statements in the commercial advertisement in this case are false. There is no constitutional protection for false advertisements. In *Bigelow* v. *Virginia* — U.S. —, 44 L. ed. 2d 600, this Court did not extend to commercial advertisements the same First Amendment protection

as it has accorded noncommercial publications. This Court in *Bigelow* held that in the circumstances of that case the commercial advertisement was protected without deciding the extent of the protection afforded under other circumstances (p. 614). At page 615, this Court said: "No claim is made, nor could any be supported on this record that the advertisement was deceptive or fraudulent," citing in footnote 13, 78 Harv. L. Rev. Art. 1197-1198 and 80 Harv. L. Rev. 1010-1015 as to the First Amendment protection afforded false advertising. The right of governmental and administrative agencies to restrain or suppress false advertising has uniformly been sustained by the courts and has been applied equally to advertising by the press as to other advertisers (*Donaldson* v. *Read Magazine,* 333 U.S. 178, 192, 92 L. ed. 620, 642; *United States* v. *Hunter,* 459 F. 2d 205, 211, 212 cert. den. 409 U.S. 934). If commercial advertisements had been accorded the same First Amendment protection as noncommercial publications, such sanctions would have been rendered impermissible and the only remedy for such falsity would be a suit for damages by an aggrieved party upon a showing of fault or malice in the appropriate case.

3. There is clear proof of malice in this case. The statements about the respondent in the advertisement, are, as the author, himself, stated in pre-trial disclosure, based on four cases discussed in the articles of August 31 and October 12 and 16, 1972. The Brooklyn Bar Association took cognizance of these articles and made an investigation, as a result of which the President of that Bar Association wrote a letter to Voice (R140, Appendix to petition p. 16a), admitted by Voice to have been received, in which he informed Voice that the Bar Association's investigation "disclosed that the facts reported by the author are inaccurate, incomplete and in many cases are totally incorrect." Voice disregarded this letter alerting

it to the falsehoods published by it and made no attempt even to check the public court records in those cases or to make any inquiry whatsoever.

A Legal Aid lawyer, named Joseph Morello, wrote a letter to New York Magazine (R139, attached to this brief as Appendix A, p. 1a) in which he advised it of the misstatements and omissions made by the author, Jack Newfield, about the *Burton* case, in the article in New York Magazine and also in Mr. Newfield's articles in Village Voice. This letter was forwarded by New York Magazine to Jack Newfield, the author, and he admitted, on pre-trial disclosure, that he received it.

In addition, the Association of the Bar of the City of New York also investigated the charges against the respondent made by Jack Newfield in his article of October 16, 1972, which are repeated in the advertisement. As part of its investigation the Association of the Bar obtained transcripts of the minutes in the cases Jack Newfield based his charges on. The Committee of the Association of the Bar interviewed Jack Newfield as to these charges on December 28, 1972 (Appendix B, p. 4a). At that time, in its discussion with him, it pointed out to him his errors and omissions in his articles about those cases. The advertisement sued on here was in preparation from October 25, 1972 to its publication on February 25, 1973. George Dillehay, Voice's officer who handled the preparation of the advertisement, testified on pre-trial disclosure that he discussed the advertisement with Jack Newfield "during the period that it was first proposed up until it was published, at different points throughout that period of time" and showed him the proposed copy and Mr. Newfield never said to him "that it was in any respect inaccurate or untrue" (R470, 474). Thus, two months after Voice had actual knowledge of the contents of the Court minutes

in the cases relied on by its author-editor in his articles and thus then knew that its statements about the respondent's conduct of those cases were untrue, it repeated those false and erroneous statements in the advertisement. This is conclusive evidence of malice in the publication of the advertisement.

ARGUMENT

I.

The judgment below is not final.

The Appellate Division held that even assuming the advertisement was privileged, the privilege would not survive a malicious publication and that there is sufficient evidence in the record to support a finding of malice (47 A.D. 2d at p. 182, appendix to petition p. 3a).

As shown, hereinafter, under our point III as to malice, there is substantial proof of malice in addition to that referred to by the Appellate Division.

Thus, regardless of the disposition of the question of the extent of First Amendment protection, absent a showing of malice, to be accorded this commercial advertisement, this case would still have to be tried in the State Court on the proof of malice shown by the respondent.

The determination of the commercial advertisement question would thus not be conclusive and render the outcome of further proceedings preordained as is required to meet the jurisdictional requirement of finality (*Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 43 L. ed. 2d at p. 340).

II.

There is no constitutional protection for false advertisements.

A.

The statement that the respondent is "Curiously lenient with heroin dealers and organized crime figures, very tough on long haired attorneys, black defendants on questions like bail, probation and sentencing" is taken from Jack Newfield's article in New York Magazine dated October 16, 1972 (R45). The statement that respondent should be criminally indicted and tried or impeached is taken from the Voice article dated October 12, 1972 (R36).

In his articles about the respondent, the author Jack Newfield wrote about four cases which had come before Justice Rinaldi, *People* v. *Burton, People* v. *Glover, People* v. *Vario* and *People* v. *Agro.* With respect to his statement that Justice Rinaldi is "curiously lenient with heroin dealers and organized crime figures" Mr. Newfield testified on pre-trial disclosure, "That statement was based on my previous writing about the Burton, Glover, Vario and Agro cases primarily" (R402) and that when he wrote that the respondent is "very tough on long haired attorneys and black defendants," he had "no specific cases in mind." (R401).

It was false to charge the respondent with such judicial bias and prejudice in his dispositions in those four cases.

In *Burton* as the Court minutes on file (R424) show, Burton was paroled without bail because the assistant district attorney stated on the record that "in view of the fact that he is on bail on two other charges and this bribery charge emanates from those two others, we will have him available. I would recommend parole." (R430).

In *Glover,* as the Court minutes on file show (R414), Glover had just received a five year Federal sentence on a conviction for robbery. Justice Rinaldi postponed Glover's case until the time to appeal from the Federal conviction had expired. Then, with the acquiescence of the district attorney, to dispose of the case, he accepted a plea from Glover with no imposition of any additional time in jail, since Glover would be in jail for the next five years. Glover was then taken off in the custody of Federal marshals to serve that five year sentence. Thus, the respondent did not, as Mr. Newfield's article stated "put people (Glover) on the street who sell death for a profit." (R30).

In *Vario,* the Court minutes (R435) show that the case came on before Justice Rinaldi four years after a conviction after a prior three month trial had been reversed because of illegal wiretaps which were suppressed by the Appellate Division. The district attorney stated to Justice Rinaldi on the record that, because of the suppressed evidence and the fact that the case was four years old, he had grave doubt that he could get a conviction and for this reason he recommended the acceptance of a misdemeanor plea from the defendants. Thus, the statement in Mr. Newfield's article that Judge Rinaldi permitted the defendants to plead guilty to a misdemeanor plea and upon such plea let them go with only a $500 fine despite the fact that the district attorney thought they should have gotten at least ten years in jail (R45), is monstrously false since the district attorney, proposing the misdemeanor plea, could never have expressed such a thought, the maximum sentence for a misdemeanor being one year.

In *Agro,* the Court minutes on file show that there was a large number of defendants, who, except for Agro, wished to plead guilty. Agro insisted he was innocent and would

not plead. The district attorney did not wish to try the case only as to Agro. He stated on the record that Agro was the least culpable and had no record and that if Agro would plead to a misdemeanor, he, the district attorney, would recommend a suspended sentence (R217-218). Agro agreed to take the plea if the Judge would promise him the suspended sentence. On the district attorney's recommendation, the respondent made the promise and later, on sentence date, kept it, as he was then required to do under *Santobello* v. *New York,* 404 U.S. 257, 262, 30 L. ed. 2d 427.

To say, as petitioners do, that they claim that the publication complained of is true (petition p. 2, footnote 2) is like saying of a married woman that she was naked in a room with a man not her husband, omitting to say the man was a doctor giving her a physical examination, and then claiming that, since she was so in the room, the statement, with all that it implies, is true.

Needless to say, the petitioners offered no proof on their motion for summary judgment of the truth of these statements, nor of the other statements in the advertisement about the "judge's activities against society" and that "Judge Rinaldi has a whole record of curious behavior" and that Judge Rinaldi is a "questionable judge" who should be eliminated by "criminal indictment and trial, impeachment by the State Legislature or trial on competency by a judicial court" (R27, appendix to petition, p. 15a).

Such statements are false and libelous (*Afro American Pub. Co.* v. *Jaffe,* (D.C. Cir.) 366 F. 2d 649, 655; *Abell* v. *Cornwall Industrial Corp.,* 241 N.Y. 327, 332, 150 N.E. 132).

The untruth of the charges is evidenced by the conclusions, after investigation, by the Brooklyn Bar Association

that "the facts reported by the author are inaccurate, incomplete and in many cases are totally inaccurate" (R140, appendix to petition p. 16a) and by the Association of the Bar of the City of New York that "Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts" (Appendix B annexed to this brief, p. 7a).

B.

Since the statements in the advertisement concerning the respondents are thus clearly false it cannot be said that "no claim is made, nor could any be supported on this record, that the advertisement was deceptive or fraudulent" (*Bigelow* v. *Virginia supra* 44 L. ed 2d 600, 615).

False advertising has always been denied First Amendment protection (*Donaldson* v. *Read Magazine,* 333 U.S. 178, 192, 92 L. ed 2d 628, 642; *E. F. Drew & Co.* v. *F. T. C.* (2 Cir) 235 F. 2d 735, 740, cert. den. 352 U.S. 969; *F. T. C.* v. *Sterling Drug Co.* (D.C.N.Y.) 215 F. Supp. 327, 332, affd. 317 F. 2d 669; *United States* v. *Hunter* (4 Cir) 459 F. 2d 205, 211, 212, cert. den. 409 U.S. 934; *Murray Space Shoe Corp.* v. *F. T. C.* (2 Cir) 304 F. 2d 270, 272.

It is inherently indecent and obscene to permit a newspaper to take advantage of the license afforded it by *Times* v. *Sullivan* to make false statements about a public official and then seek to capitalize on the falsity by an advertisement repeating and bragging about the falsehoods to obtain paid subscriptions to its paper (See 80 Harv. L. Rev. 1031).

A newspaper has no greater right to advertise its product than does any other product advertiser (*Curtis Publishing Co.* v. *Butts* 388 U.S. 130, 150, 18 L. ed 2d 1094;

United States v. *Hunter, supra,* 459 F. 2d 205, 211, 213, 214, cert. den. 409 U.S. 934; *Associated Press* v. *Labor Board,* 301 U.S. 103, 132-133, 81 L. Ed 953, 969; *Branzburg* v. *Hayes* 408 U.S. 665, 682-683, 33 L. ed 2d 626, 640).

The director of agency services for petitioner Scali, Leonard Hultgren, testified on pre-trial disclosure that Voice was just another advertising client, sales of whose product was sought to be enhanced, and was no different to the agency than advertisers of products such as beer, cigarettes or automobiles (R491-492).

In the case of *Booth* v. *Curtis Publishing Co.* 15 A. D. 2d 343, 223 N.Y.S. 2d 737 affd. 11 N.Y. 2d 907, 182 N.E. 2d 812, cited at page 10 of the petition, there was nothing false in the advertisement. The Court there stated (15 A.D. 2d at pp. 351, 352) that the advertisment was a "true and fair presentation" in which the plaintiff "was properly and fairly presented."

It is the setting given the commercial advertisement which places it beyond First Amendment protection (*Breard* v. *Alexandria,* 341 U.S. 622, 642, 95 L. Ed. 1233, 1248).

Such a commercial setting has denied First Amendment protection in obscenity cases (*Ginzburg* v. *United States,* 383 U.S. 463, 465, also footnote 17 p. 474, 16 L. ed 2d 31, 40; *Paris Adult Theatre I* v. *Slayton* 413 U.S. 49, 69, 37 L. ed 2d 446; *Miller* v. *California* 413 U.S. 15, 34, 36, 37 L. ed 2d 419; *Kaplan* v. *California,* 413 U.S. 115, 120, 37 L. ed 2d 492) and to users of the flag for commercial purposes (*Halter* v. *Nebraska* 205 U.S. 34, 51 L. Ed. 696; *Smith* v. *Goguen,* 415 U.S. 566, 39 L. ed. 2d 605, *Spence* v. *Washington,* 418 U.S. 405, 41 L. ed. 2d 842).

III.

There is ample proof of malice in this case.

In his article dated August 31, 1972 (R29), Jack Newfield wrote in Voice about the *Burton* and *Glover* cases. In the article dated October 12, 1972 (R33) he repeated what he had said about *Burton* and *Glover* : "Six weeks ago I wrote a Voice article describing two cases involving heroin dealers where Judge Rinaldi let them both go without a jail sentence (Justice Gets A Fix, Voice August 31)" and he then discusses the alleged facts about both cases. The October 12, 1972 article then discusses the *Vario* and *Agro* cases. In his New York Magazine article dated October 16, 1972 Newfield repeats his statements about the *Burton, Glover* and *Vario cases* (R45).

The Brooklyn Bar Association, its attention having been called to these articles, conducted an investigation of the charges made therein. By letter dated November 28, 1972 (R140, appendix to petition p. 16a) the President of the Brooklyn Bar Association advised Voice of the "results of the investigation which discloses that the facts reported bythe author are inaccurate, incomplete and in many cases are totally incorrect." A similar letter was written by the President of the Bar Association to New York Magazine (R329). The receipt of the Brooklyn Bar Association letter is admitted by Voice. George Dillehay, the officer of Voice, who handled the preparation of the advertisement, also admitted on pre-trial disclosure that he had read the letter (R.468).

Although in receipt of such a letter from so responsible a source, Voice disregarded it. It did nothing, although the official stenographic minutes in all these cases were sitting in the files, as a public record, available to anyone

to examine. Voice did not even reply to the Brooklyn Bar Association requesting any further details.

Petitioners brazenly assert (petition, p. 13) that they were completely justified in ignoring the advice in the letter, that the articles were erroneous, because the letter did not specifically point out the errors and that Voice had no obligation to request this information, that it was the obligation of the Bar Association to supply it and not having done so, Voice could ignore the Bar Association's alert to Voice's misstatements.

For the purposes of satisfying the requirements of showing malice, it is patently sufficient that the publisher's attention was called to the fact that its publication was incorrect by a responsible and reliable informant, which the Bar Association certainly was. To totally disregard such a communication and to republish the false statements in the advertisement is, at the very least, to circulate it "with reckless disregard for its truth or falsity" (*Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. 469, 43 L. ed 2d at p. 346).

The statement at page 13 of the petition that the advertisement sued on was based on the Voice article of August 31, 1972 and not on the October 12 and 16, 1972 articles is likewise untrue. The heading in the advertisement: "the judge let the pusher go free" is taken from the article of October 12, 1972 (R33). The statement that the respondent is "curiously lenient with heroin dealers and organized crime figures. Very tough on long-haired attorneys, black defendants on questions like bail, probation and sentencing" is taken from the New York Magazine article of October 16, 1972 (R45). The statement that the respondent should be eliminated by criminal indictment and trial or impeachment or judicial trial on incompetency

is taken from the Voice article of October 12, 1972 (R36). This is apparent from a reading of the articles since they are virtually verbatim statements therefrom. Jack Newfield, on pre-trial disclosure, admitted this (R302-303, 374-376). Karen Gray, the copy writer for Scali, who prepared the advertisement, testified on pre-trial disclosure (pp. 15-17) that these statements in the advertisement were taken by her from these October 12 and 16 articles.

On October 12, 1972, a Legal Aid lawyer, named Joseph Morello, wrote a letter to New York Magazine advising it that the statements in its article with respect to the *Burton* case, more elaborately stated in Jack Newfield's prior Voice article, were erroneous. Mr. Morello specifically informed in his letter that Justice Rinaldi released Burton without bail "*only* upon the consent and recommendation of the District Attorney" (R139, Appendix A annexed to this brief, p. 1a). ***Mr. Newfield admitted that New York Magazine forwarded Mr. Morello's letter to him and that he received it*** (R319). He thus had specific knowledge, from the letter, that in *Burton* the district attorney had recommended the parole. If Voice chose to disregard this knowledge conveyed to its author, who was also one of its editors, and to republish the falsity, despite such knowledge, this constitutes malice (*St. Amant* v. *Thompson* 390 U.S. 727, 731 20 L. ed 2d 262, 267).

The letters received from the Brooklyn Bar Association and Mr. Morello show knowledge by Voice sufficient to constitute malice in the publication of the falsehoods in the advertisement (*Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. 130, 161 (footnote 23), 18 L. ed 2d 1094, 1115; *Davis* v. *Schuchat* (D.C. Cir. 1975) 510 F. 2d 731, 735; *Church of Scientology of Cal.* v. *Dell Publishing Co.* (D.C. Cal.) 362 F. Supp. 767, 770; *Varnish* v. *Best Medium Publishing Co.* (2 Cir.) 405 F. 2d 608, cert. den. 394 U.S. 987;

Goldwater v. *Ginzburg* (2 Cir.) 414 F. 2d 324, 337, cert. den. 396 U.S. 1049; *Guam Federation of Teachers* v. *Israel* (9 Cir.) 492 F. 2d 438, 439).

In addition, the respondent now has evidence from the Report of the Association of the Bar which conclusively establishes that two months before the publication by the petitioners of the advertisement in the New York Times on February 25, 1973, Jack Newfield was apprised of and knew the contents of the official court transcripts of the minutes in the *Burton, Glover* and *Vario* (referred to in the Report as Marinaci) cases. The respondent knew that the Association of the Bar was making an investigation and had obtained copies of these minutes. Though the Report is dated June 8, 1973, it is a confidential report and was not made public until April 9, 1974. Some time thereafter, the respondent obtained a copy of the Report and, for the first time, learned that the Bar Association Committee had interviewed Jack Newfield on December 28, 1972 with respect to his charges against respondent. Thus, when the petitioners moved for summary judgment on December 6, 1973 (R83), respondent was unaware of this and, of course, it is not a part of the opposing affidavit on the motion.

The Association of the Bar was investigating Jack Newfield's article dated October 16, 1972 in New York Magazine entitled "The Ten Worst Judges in New York" (R43). Its Report, deleting the references to judges other than respondent, is annexed to this brief, as Appendix B, p.). In the article, Jack Newfield made the statement about respondent, which is repeated in the advertisement sued on herein (R27 appendix to petition, p. 14a) that "Rinaldi is very tough on long-haired attorneys and black defendants on questions like bail, probation and sentencing. But his judicial temper softens remarkably before heroin dealers and organized crime figures." He then, in that

article, discusses the *Burton, Glover* and *Vario* cases as the basis for these statements. On pre-trial disclosure, he testified that these statements of his were based "on the *Burton, Glover, Vario* and *Agro* cases primarily" (R402).

From the Bar Association Report, and its discussion of the contents of the minutes in the three cases, *Burton, Glover* and *Vario*, it is clear that the Committee called the attention of Mr. Newfield in the interview, to the contents of these minutes and questioned him about his omissions of vital facts in these cases in his article. Thus, at that time, Jack Newfield knew what had actually occurred in court in those three cases and that he had omitted essential facts from his article which thus falsely distorted the respondent's actions in those cases.

The advertisement, upon which this suit is based, was in preparation through a series of revisions from October 25, 1972 to its insertion in the New York Times on February 25, 1973 (R533-547). George Dillehay was the officer of Voice who handled the preparation of the advertisement. He testified on pre-trial disclosure that he discussed this advertisement, before it was published, with Jack Newfield "during the period that it was first proposed up until it was published, at different points throughout that period of time" (R470) and that he showed Mr. Newfield the proposed copy and that Mr. Newfield "had seen what was going to be said in the ad and what was finally said, in substance" and that Mr. Newfield had never said to him "that it was in any respect inaccurate or untrue" (R474).

Jack Newfield testified on pre-trial disclosure that if he knew, when he wrote the article about *Burton*, that the district attorney had recommended and consented to Burton's release without bail, he would have put that in the story in "plain fairness" and that "if I knew it and withheld that

information, it would have been unfair" (R326-327). Yet, during his discussions of the proposed advertisement with Mr. Dillehay, when he did know, he did not tell Mr. Dillehay that it was erroneous or unfair. Of course, a fair and accurate statement of the facts in the *Burton*, as well as the *Glover*, *Vario* and *Agro* cases would have made the advertisement useless from the petitioners' muckraking standpoint and a fair and accurate advertising copy would have been discarded and never published. Only the false advertisement was suitable to the petitioners' purposes.

This, previously unknown to respondent, evidence will, of course, be used by respondent on the trial and constitutes overwhelming proof of malice.

Mr. Newfield testified on pre-trial disclosure that what he wrote about the fourth case he relied on, *Agro*, in his article dated October 12, 1972 (R33) he had taken from an article in the New York Times of September 25, 1972 (R47) which is referred to in the advertisement (R27 appendix to petition, p. 15a). Mr. Newfield admitted that the Times article contained the following statements which he had read before he wrote his article dated October 12, 1972 (R331-332):

> "The assistant district attorney in charge of the case apparently concurred with the judge's decision. He later signed a report saying that the pleas in each instance are recommended and the sentence in each case would be adequate.
>
> He said in the report that Agro was the least culpable of the defendants. Salvatore Agro was thirty-eight years old and had no prior record, Mr. Panzarella said."

Yet, although Mr. Newfield had previously testified that if he knew, when he wrote about the *Burton* bail arraign-

ment that the district attorney had recommended parole and had not written it, it would have been unfair, he admitted that though he knew of the district attorney's recommendation in *Agro*, he did not mention it in his article. When asked if he thought this likewise was unfair, he testified (R333):

> A. I think it was fair. I am summarizing that case in two paragraphs.
>
> Q. You mean The Village Voice limited you in space? A. No.

In the same New York Times article (R46) it is stated as to *Vario* that on Vario's misdemeanor plea he could have been given up to a year. Mr. Newfield admitted having read this before he wrote on October 12, 1972 that Vario could have gotten 15 years in jail (R33) and on October 16, 1972 that the District Attorney thought that he should have gotten at least ten years in jail (R45). These statements were thus known by him to be false when written and therefore written with malice.

The headline of the August 31, 1972 article (R29) reads:

BROOKLYN'S JUDGE RINALDI
JUSTICE GETS A FIX

There is nothing in the article which claims, as the headline clearly connotes, that the respondent was bribed or improperly influenced to parole Burton without bail, or in his sentence of Glover. On pre-trial disclosure, Jack Newfield testified: "In none of these articles do I allege corruption or venality" (R377). "I have no evidence of corruption" (R378). Yet, the headline clearly expresses the existence of venality or corruption, knowing that nothing in the article supports it. This is clearly malice.

The large caricature likeness in the advertisement of the respondent in judicial robes in association with the pusher, Burton, placed therein by Scali and approved by Voice, is, in itself, defamatory and malicious. Scali and its copy writer, Karen Gray, who prepared the advertisement, admitted, in the course of pre-trial disclosure, that the caricature was intended to be and was a likeness of the respondent and was intended to and did represent the pusher, Burton.

Karen Gray, a copy writer, testified in pre-trial disclosure, that the caricature was included in the advertisement right from the original draft (p. 8); that the heading which she put on the original draft was (R533):

THE PUSHER WENT FREE
THE JUDGE MAY GO TO JAIL

Karen Gray then testified as follows (p. 9):

> Q. What was the purpose of including this caricature? A. As I recall, to illustrate the headline.
> Mr. Finell: The headline of the advertisement.
> A. The judge and the pusher are mentioned in the headline. It is supposed to illustrate.

In the next two revisions of the draft of the advertisement (R535-537) the heading was changed to "The judge could go to jail" and was thereafter changed to its final form (R27, appendix to petition, p. 15a). The malicious caricature inserted in the first draft to illustrate the original headline remained however. The insertion of the caricature in the advertisement prepared by Scali and approved by Voice knowing that it falsely represented a criminal association of the judge with the pusher, constitutes malice on the part of the petitioners.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

IRWIN N. WILPON
Counsel for Respondent

September 1975.

APPENDIX A

October 12, 1972

The Editor
NEW YORK MAGAZINE
207 E. 32nd Street
New York, N.Y. 10016

Sir:

In reference to Newfield's article on the 10 worst judges.

I want to comment on his charges against Judge Rinaldi. Newfield accuses Rinaldi of letting a heroin seller go without bail.

Your author had elaborated these charges in a Village Voice article this past summer.

A brief glance at the court records will indicate:

1. Rinaldi did not arraign this defendant on the drug charge; he was arraigned before another Judge and bail was set.

2. Rinaldi did release the defendant without bail on a bribery charge (arising out of the drug bust), however, he did so *only* upon the consent and recommendation of the District Attorney.

(I practice in the Brooklyn Supreme Court with Legal Aid, have appeared before Justice Rinaldi. My hair was fairly long and I never experienced any extra flack.)

If Newfield's research on other points and judges is as faulty as this, you really have done a disservice in publishing his story without verification. The judges are not permitted to respond and set the record straight and a decent respect for your readership requires special care and attention.

Very truly yours,

JOSEPH VINCENT MORELLO
Associate Attorney

JVM:zk

CONFIDENTIAL

APPENDIX B

June 8, 1973

Orville H. Schell, Jr., Esq.
President—The Association of the
Bar of the City of New York
42 West 44th Street
New York, New York 10036

Re: Newfield Article—
"The Ten Worst Judges in New York"

Dear Mr. Schell:

In early December 1972 you requested the Association's Committee on State Courts of Superior Jurisdiction to investigate the charges made by Jack Newfield against the judges within that Committee's jurisdiction in an article entitled "The Ten Worst Judges in New York", which appeared in the issue of New York Magazine dated October 16, 1972 (pages 32-36). A copy of the article is annexed hereto.

You indicated that your request stemmed both from the commitment of the Association to defend judges against unjust criticism and from the duty of the Association to investigate charges against sitting judges. As we have also discussed, the investigation is highly relevant to the adequacy of existing procedures for the discipline and removal of judges, an area of great interest to this and other bar associations. You imposed no conditions or restrictions on your request and made no recommendations with regard to the form our conclusions might take. You simply asked us to investigate the charges and to report to you what we found, together with any recommendations we might wish to make.

Appendix B

With the above in mind, and without any preconceived notions as to what our conclusions or recommendations might be, our Committee promptly commenced its investigation by forming eight subcommittees, each composed of three members, and assigning to each subcommittee one of the eight Supreme Court judges specifically listed and criticized by Mr. Newfield as being among his "Ten Worst". Those judges were Gerald Culkin, Wilfred Waltemade, Dominic Rinaldi, Albert Bosch, George Postel, Edward Dudley, Paul Fino, and John Monteleone. Justices Culkin, Waltemade, Postel, Dudley and Monteleone were approved by this Association. Justice Fino was rated "not approved", but based solely on his refusal to appear for an interview. There is nothing in the Association's files on Justices Rinaldi and Bosch.

While the method of investigation necessarily varied for the different judges depending on the nature of the charges, interviews of practitioners and court personnel were carried out extensively, as well as review of transcripts of trials or of opinions where appropriate. Charges or intimations of bias or corruption in particular required extensive review of transcripts and opinions. Where specific trials or proceedings were referred to, the subcommittees often attempted to interview the attorneys on both sides. In most cases such interviews were carried out successfully.

The Committee also decided at the outset of its investigation that it was not only appropriate but advisable from the point of view of fairness to interview the eight judges being investigated as well as Mr. Newfield himself. Seven of the eight judges were interviewed; the single exception was Justice Fino, whose secretary kept finding it impossible to arrange for an interview and ultimately referred the

subcommittee to his attorney, who delayed fixing any date for an interview and ultimately simply defaulted. In addition, six or seven members of our Committee met with Mr. Newfield and his attorney, Martin Garbus, for almost two hours at the Association on December 28, 1972.

We have also conferred with the District Attorneys for New York and Kings Counties and with the Governor's Special Prosecutor, Maurice Nadjari. In addition, we had a check made of the files of the Association's Grievance Committee and Judiciary Committee and reviewed various recent investigative reports and articles which have appeared in The New York Times.

This description of the various sources of information resorted to by our subcommittees is not complete. The full reports of the various subcommittees, copies of which we are furnishing to you under a separate cover, indicate the additional sources relied on.

Having outlined generally the approach of the Committee and the sources to which it turned, it must be added that the Committee does not have subpoena or similar powers or an investigating staff, and to that extent the Committee is severely restricted in any investigation of this nature. No pretense can be made that these investigations are exhaustive or of the type that could be carried out by appropriate investigative authorities. Moreover, the Committee generally limited itself to the criticisms and charges in the Newfield article and to areas clearly related to the article—it did not attempt a full investigation of each judge listed by Mr. Newfield.

There follow the conclusions of each subcommittee with regard to the charges made by Mr. Newfield against the eight judges under our jurisdiction. The conclusions have been prepared in a manner deemed fit for publication by the

Association, which simply means that every effort has been made to be fair and to avoid reliance on rumor or hearsay. While this constitutes a report of the whole Committee, it should be stressed that only the members of each subcommittee are familiar with that subcommittee's full investigation and therefore non-members of a particular subcommittee have relied on the ability and integrity of the membership of each subcommittee. After presenting these conclusions, we will indicate our recommendations as to what may appropriately be done by the Association on the basis of this investigation.

Justice Rinaldi

Mr. Newfield alleges that Justice Rinaldi is very tough on long-haired attorneys and black defendants on questions of bail, probation, and sentencing. Since he gives no examples to substantiate the charges, the subcommittee did not evaluate them.

Mr. Newfield's other charge, to which he devotes the balance of the section on Justice Rinaldi, is that his "judicial temper softens remarkably before heroin dealers and organized-crime figures". As to this charge he gives three cases as examples.

Mr. Newfield criticizes Justice Rinaldi for having released Norman Burton, an alleged heroin dealer, without bail after he had been arrested on charges of possession of heroin and attempting to bribe a policeman. Mr. Newfield ignores the facts that Burton was already out on $3,000 bail on another charge, that no bench warrant was ever issued against him, and that the Assistant District Attorney had assented to Burton's being paroled without bail.

Appendix B

Mr. Newfield also criticizes Justice Rinaldi on the ground that he gave a "conditional discharge" to another drug dealer, Clifton Glover, notwithstanding that Glover had two prior arrests for selling heroin and, according to Mr. Newfield, could have been given twenty-five years in jail. Mr. Newfield omits to mention that five months earlier Glover had pleaded guilty to an unrelated robbery charge in the federal court and had been sentenced to five years imprisonment, from which no appeal had been taken. The "conditional discharge" given by Justice Rinaldi came after plea bargaining and Justice Rinaldi recognized that Glover had also received the federal court sentence of imprisonment. The transcript shows that the Assistant District Attorney remained mute when the sentence was imposed.

In fact, Glover was not entitled to a conditional discharge under the Penal Law for a Class C felony. Justice Rinaldi told the subcommittee that he gave the conditional discharge, knowing that it was not legally correct, because the Assistant District Attorney told the Court that the defendant was an informer and that the defendant and the Assistant District Attorney had agreed on the conditional discharge sentence. As to this, the Assistant District Attorney apparently had no recollection. On the other hand, the most Glover could have been given was fifteen years, not the twenty-five suggested by Mr. Newfield. While an illegal sentence cannot be approved, the subcommittee found no justification for the motivation imputed to Justice Rinaldi by Mr. Newfield.

With regard to the case involving Marinacci and others, Mr. Newfield charges that Justice Rinaldi imposed only $500 fines after the defendants, "prominent organized-crime figures", pleaded guilty to misdemeanors, adding

that the District Attorney thought that three of them should have received at least ten years in jail.

Mr. Newfield fails to mention that an earlier conviction of three of the defendants had been reversed on appeal because wiretap evidence was held inadmissible and prejudicial. Thereafter, the two Assistant District Attorneys involved had disagreed as to the chances of a successful second prosecution. The defendants then appeared before Justice Rinaldi, and the Assistant District Attorney expressed doubts in open court about a successful conviction because of evidence problems and because the case was four years old. It was therefore agreed that the defendants would plead guilty to a misdemeanor and the Assistant District Attorney in court recommended the acceptance of the plea. Justice Rinaldi sentenced one of the defendants to time already served (more than twelve months), two others to a $500 fine or six months in jail, and the fourth to a $250 fine or three months in jail.

Clearly, the District Attorney's Office felt that the sentences were not severe enough, with the possible exception of the defendant who had already served twelve months, but there is no basis for the claim that the defendants should have been given at least ten years. Not only is it denied by one of the Assistant District Attorneys, but also the maximum jail sentence was one year for the misdemeanor for which the pleas were accepted. The probation report as to two of the defendants recommended a fixed jail sentence. As to another defendant, Justice Rinaldi imposed sentence without benefit of a probation report on the ground that he had pleaded guilty to a misdemeanor.

Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts.